



# Cross Examination Skills

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# Defense Theories and Themes

- ▶ How important is this?

- ▶ **Affects all parts of the trial**

- ▶ Pretrial motion practice
    - ▶ Voir dire
    - ▶ Opening
    - ▶ Cross examination
    - ▶ Direct examination
    - ▶ Closing

- ▶ **Affects what the jury thinks about you and your client**

- ▶ Credibility
  - ▶ Client's guilt, innocence and in between

- ▶ **Affects you as the lawyer**

- ▶ How you look
  - ▶ How you talk
  - ▶ How you present your case



# What are your choices for Theories and Themes?

## 1. There was no crime; it didn't happen

- ▶ Sexual battery/child molestation
- ▶ Felonious child abuse / capital murder
- ▶ Armed robbery with delayed reporting

## 2. It happened, but I didn't do it

- ▶ Alibi
- ▶ Mistaken identification
- ▶ Drug possession; it wasn't mine or I didn't know it was there

# Theories and Themes cont'd

## 3. It happened, I did it, but it wasn't a crime

- ▶ Self-defense
- ▶ Consensual sexual intercourse – false cry of rape

## 4. It happened, I did it, it was a crime but it wasn't this crime

- ▶ Lesser included/less serious offenses
  - ▶ Murder/manslaughter
  - ▶ Kidnapping/false imprisonment
  - ▶ Burglary/trespass
  - ▶ Grand larceny/petty larceny



# Theories and Themes cont'd

5. It happened, I did it, it was the crime charged, but I'm not responsible
  - ▶ Insanity
6. It happened, I did it, it was the crime charged, I'm competent, so what
  - ▶ Jury nullification – he needed killing

# The Rules on Cross Examination

- ▶ Improper to ask question when there is no reasonable basis to believe it is relevant to case.
- ▶ Improper to ask a question with no substantial purpose other than to embarrass, delay, or degrade.
- ▶ Lawyer should not use cross-x to discredit or undermine a witness he/she knows is testifying truthfully.
- ▶ Lawyer should not ask a question that implies a factual basis for which a good faith belief is lacking.
- ▶ Lawyer's belief or knowledge that witness is telling the truth does not preclude cross-x, but should, if possible, be taken into consideration by counsel in conducting cross-x.



# The Good, The Bad and The Ugly





# The Bad

- ▶ Cross Examination is a difficult trial skill
- ▶ Witness is there to hurt you, not help you
- ▶ Perry Mason Syndrome- anticipation level
- ▶ Requires planning, focus, concentration, creativity



# The Ugly

- ▶ Three Stages:
  - ▶ Traditional introductory incantations
  - ▶ Begging
  - ▶ Demolish, Destroy, Devastate –  
ARGUE, ARGUE, ARGUE

# The Good

- ▶ There is a system!
  - ▶ You can cross examine and look good at the same time
  - ▶ Cross examination is a monologue, not a dialogue
  - ▶ Cross is not just question/answer
  - ▶ It can tell a story, paint a picture, create an image, present your theory and persuade



# Objectives

- ▶ Present helpful information

- ▶ For the jury
- ▶ For your client

- ▶ Look good

- ▶ You
- ▶ Your client
- ▶ Your case

# Confrontation

- ▶ Was witness truthful?
  - ▶ Did witness remember accurately?
  - ▶ Did witness perceive correctly?
  - ▶ Was the witness's meaning conveyed adequately?
- ▶ \*Think\*
    - Poor vision
    - Poor lighting
    - Poor opportunity
    - Bias or motive
    - Prior crimes/bad acts
    - Substance abuse
    - Mental instability



# The System

- ▶ Control the witness
  - ▶ Keep it short
    - ▶ Eliminate prefixes
    - ▶ Eliminate suffixes
  - ▶ Why?
    - ▶ Too long turns it into a question and does not control the action
- ▶ Statements not questions
  - ▶ Never open-ended
  - ▶ Never typical question beginnings
  - ▶ Never!:
    - ▶ Who
    - ▶ What
    - ▶ When
    - ▶ Where
    - ▶ Why
    - ▶ How

# Examples

- ▶ What do people call you?
- ▶ What is your nickname?

**VS.**

- ▶ People call you "slash"
- ▶ Your street name is "slash"
- ▶ It's true that your friends call you "slash"

- ▶ Where did you see the knife?
- ▶ When did you see the knife?

**VS.**

- ▶ You first saw the knife on the porch floor
- ▶ You never saw it anywhere else
- ▶ The knife was on the porch floor when you first saw it



# Examples

- ▶ When did you arrive?
- ▶ What time did you get there?

**VS.**

- ▶ You got to the bar around 3 AM
- ▶ You didn't get there until 3 AM

- ▶ Did Little Johnny ever have the knife in his hand?
- ▶ Did you see little Johnny with the knife?

**VS.**

- ▶ You did not see the knife in Little Johnny's hand
- ▶ You never saw the knife in Little Johnny's hand

# Looping

- ▶ **Incorporating good or important answers into the next question**
  - You first saw the knife on the floor of the bar
  - You first saw the knife on the floor of the bar after Billy Badass was stabbed
  - You never saw the knife in Little Johnny's hand because you only saw it on the bar floor after Billy Badass was stabbed



## Misdirection

- ▶ Intended to confuse or cause indecisiveness

## Trilogies and Repetitions

- ▶ You remember seeing the knife on the bar room floor
- ▶ You remember seeing the knife on the bar room floor after Billy Badass was stabbed
- ▶ You first saw the knife on the bar room floor after Billy Badass was stabbed
- ▶ You never saw the knife before Billy Badass was stabbed



# Discrepancy in Police Report

- ▶ Officer Smith, you wrote a report in this case.
- ▶ You write hundreds of reports.
- ▶ You work a lot of cases.
- ▶ Time passes, memory fades.
- ▶ You write reports soon after the event.
- ▶ When your memory is at its best.
- ▶ To aid you months later if you have to testify.
- ▶ To refresh your memory.
- ▶ About important details.
- ▶ Because each case is important.
- ▶ Because it's very important to make sure this jury hears the truth.
- ▶ To make sure this jury gets accurate info.
- ▶ To make sure this jury is not misled.
- ▶ So of course you are careful when you write your report
- ▶ As you were in this case.
- ▶ As you were when you wrote this report.
- ▶ Which-----



# Transitions

- ▶ Relate evidence to conclusions
- ▶ Aid memory, recall and understanding
- ▶ Examples:
  - ▶ **Boring:** “Calling your attention to March 12, 2009, at or about 3 AM, what, if anything, unusual occurred?”
  - ▶ **Better:** “I want to ask you some questions about what happened at John’s Bar around 3 that morning. You understand?”
    - ▶ “Now let’s talk about what happened around 3 that morning, OK?”
- ▶ NO LEGALESE

## Response to Objections

- ▶ “As your Honor well knows . . .”
- ▶ “Of course, your Honor . . .”
- ▶ “Thank you, Judge . . .”

## Objectives

- ▶ Tell your story
- ▶ Through statements of the witnesses
- ▶ Made by you
- ▶ Giving you more plausibility



# The Intractable Witness

→ don't get mad or frustrated!

## UGLY RESPONSES:

- ▶ "All my questions can be answered YES or NO"
- ▶ "Just say YES or NO"
- ▶ Interrupt the witness
- ▶ "Your Honor, would you instruct the witness to answer YES or NO"
- ▶ "I move to strike as nonresponsive"
- ▶ "Cautionary instruction"

## BETTER RESPONSES:

- ▶ "I'm sorry I confused you; let me try again"
- ▶ "Can you try to answer my question?"
- ▶ "You came here to tell the truth. If the simply truth is yes, can't you just tell us yes?"
- ▶ "What did I ask you?"

# Training the Witness

- ▶ Wrong answer
  - ▶ Repeat same statement
    - ▶ Slowly
    - ▶ Questioning inflection
    - ▶ Use of witness's name
- ▶ **Covering yourself**
  - ▶ You were wrong – "Detail"
  - ▶ Turn your back, repeating statement
  - ▶ Repeat the sequence



# Report Card

- ▶ **A** = YES
- ▶ **B** = NO
- ▶ **C** = I don't know; I don't remember;  
non-plausible response
- ▶ **F** = anything else

# Be like Tom

